Joint Federal-Provincial Regulation of Marine Wind Energy Development in Offshore Nova Scotia

Understanding Anticipated Amendments to the *Accord Acts* Regime

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Executive Summary

Offshore Nova Scotia has been the subject of competing jurisdictional claims by Canada and the Province of Nova Scotia for more than half a century. Parliament and the Province both assert ownership of and jurisdiction over various locations and resources that are available within the offshore area as a whole, and their respective claims are informed by centuries-old British common law, Canadian constitutional law, and historical developments in international law. Several of the questions concerning Canada and Nova Scotia's respective claims to the offshore have not been fully resolved, but more than forty years of cooperation between Parliament and the Province have demonstrated that definitive resolution is not really necessary for the two governments to coordinate effective resource management in the offshore.

In May 2023, Canada's Minister of Energy and Natural Resources introduced Bill C-49 in the House of Commons. Bill C-49 is a proposed "Act to amend the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and to make consequential amendments to other Acts". As concerns the evolving legal regimes for wind energy developments in marine areas within and around Nova Scotia, the Bill is significant because it proposes legislative amendments that will be necessary to facilitate joint federal-provincial regulation in the offshore area that is currently governed under the Canada-Nova Scotia Offshore Petroleum Resources Accord and its implementing legislation (the "*Accord Acts*"). Included among the proposed amendments are changes that will rename the Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB") as the Canada-Nova Scotia Offshore Energy Regulator ("CNSOER" or the "Regulator") and give the Regulator an expanded mandate to regulate offshore renewable energy projects of various kinds.

The *Accord Acts* amendments proposed by Bill C-49 will lay the foundation for marine wind energy regulation in the jointly-managed waters of offshore Nova Scotia. The Bill proposes to introduce a new process that will govern the issuance of "submerged land licences" for offshore renewable energy projects in the marine area covered by the *Accord Acts* regime. As proposed, Bill C-49 envisions that the CNSOER will form opinions on areas within offshore Nova Scotia that, in its view, should be opened to Calls for Bids for offshore renewable energy projects. The Regulator will then make an "offshore renewable energy recommendation" to Canada's Minister of Energy and Natural Resources and Nova Scotia's Minister of Natural Resources and Renewables (together, the "Ministers"), who will decide whether or not to adopt the Regulator's recommendation to issue a Call for Bids. If a Call for Bids is issued, prospective developers will bid for the opportunity to obtain submerged land licences. The Regulator will form an opinion on which bidder(s), if any, should be successful, and the Ministers will decide whether or not to adopt the Regulator's recommendation(s) in that regard. Successful bidders will be granted submerged land licences that confer rights to develop offshore renewable energy projects in the licence areas, but further activity authorizations from the CNSOER will be required before actual offshore renewable energy facilities are constructed and operated.

There are several interesting and potentially promising aspects of Bill C-49, but there are also opportunities for improvement. This report highlights four, suggesting that the amendments proposed in Bill C-49 could be revised to: expand the purpose section of Part III of the *Accord*

Acts to contextualize the new mandate of the CNSOER; clarify the intention of the regional assessment and strategic assessment provisions of the Bill; require the CNSOER to conduct regional assessments, strategic environmental assessments, and environmental assessments in specified circumstances, and impose associated requirements and guidelines for meaningful cumulative effects assessment; and, finally, impose requirements for public participation opportunities and associated participant funding programs.

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1.0 Introduction

In recent years, the Government of Canada and Government of Nova Scotia have demonstrated a shared interest in fostering a world-class offshore wind regime in offshore Nova Scotia. "Offshore Nova Scotia" is a sizeable marine area that stretches generally from the low-water mark of Nova Scotia's coasts to coordinated boundaries distinguishing the waters of offshore New Brunswick, Newfoundland and Labrador, and Prince Edward Island to north—while, to the south, the boundaries of offshore Nova Scotia extend to the edges of the region under which Canada's rights to explore and exploit the natural resources of the continental shelf are recognized under international law.

Canadian federalism, with its division of jurisdiction between Parliament and the provinces, makes offshore resource management a complex matter. Like other offshore areas across Canada, offshore Nova Scotia has been the subject of competing jurisdictional claims by Canada and the Province of Nova Scotia, with both asserting ownership of and jurisdiction over various locations and resources available within the area as a whole. Several of the questions concerning Canada and Nova Scotia's respective claims to the offshore have not been fully resolved, but more than forty years of cooperation between Parliament and the Province have demonstrated that definitive resolution is not really necessary for the two governments to coordinate effective resource management in the offshore.

1.1 Nature and Purpose of the Report

This report is one of two companion pieces that build on legal research and analysis that East Coast Environmental Law conducted for the Ecology Action Centre in the winter of 2023. The earlier research sought to identify best practices for the assessment and permitting of offshore wind developments by examining regulatory regimes established within Germany and the European Union ("EU"), the United Kingdom of Great Britain and Northern Ireland ("UK"), and the United States of America ("US"). That research focused mainly on environmental assessment processes that existed at various levels of the regulatory regimes under study, and it considered the potential for tiered environmental assessment processes within Canada's nascent offshore wind regime. The research did not explore site leasing or licencing at length—whether under Canadian laws or the laws of the foreign regimes—but leasing and licencing processes were identified as being important components of the foreign regimes, and it was understood that Canadian and Nova Scotian processes would be valuable topics for further study.

This report and its companion piece expand on that earlier work by examining the site leasing or licencing processes that can be expected to facilitate wind energy development in offshore Nova Scotia.

This report focuses on the submerged land licencing regime that has been proposed for wind energy development in the offshore area where oil and gas activities have been managed jointly by Canada and Nova Scotia under the Canada-Nova Scotia Offshore Petroleum Resources Accord ("CAN-NS Accord") and its implementing statutes: the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* ("*Federal Accord Act*") and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act* ("*Provincial*

Accord Act) (together, the "*Accord Acts*"). Its companion piece, entitled "Provincial Regulation of Marine Wind Energy Development in 'Nova Scotia Waters': Understanding the 'Regulatory Path' that the Government of Nova Scotia Might Establish under the *Marine Renewable-electricity Act* and Other Provincial Statutes and Regulations", focuses on the licensing regime that may be established to govern wind energy development in marine areas over which the Government of Nova Scotia asserts independent jurisdiction.

1.2 The Evolving Regulatory Regimes for Wind Energy Development in Offshore Nova Scotia

As of yet, no wind energy facilities have been installed in offshore Nova Scotia—indeed, marine wind energy developments are still prospective throughout Canada as a whole. This may be due in part to the absence of coordinated law and policy that would signal Canada's readiness to developers. If so, numerous expressions of ambition and enthusiasm by the Government of Canada and Government of Nova Scotia over the past year and a half in particular—combined with several noteworthy assessment, law reform, and policy initiatives—may succeed in attracting the industry attention that the two governments clearly desire.

Currently, the legal regimes that would govern wind energy development in offshore Nova Scotia are sparse. At the federal level, two statutes impose assessment and authorization requirements: the *Canadian Energy Regulator Act* ("*CERA*") and the *Impact Assessment Act* ("*IAA*"). Notably, the status of the *IAA* is currently in flux due to a recent opinion of the Supreme Court of Canada that found the Act unconstitutional in part.[1] The Act remains in force pending anticipated amendments by the Government of Canada, and a policy statement by the government explains how the Act will be administered during this interim period.[2]

Part 5 of the *CERA* deals specifically with offshore renewable energy projects and offshore power lines. Essentially, this part of the Act establishes a general prohibition that forbids any person from carrying on any unauthorized work or activity related to an "offshore renewable energy project" or offshore power line within the "offshore area"; it also forbids any person from carrying on any unauthorized work or activity to construct, operate, or abandon any part of an offshore power line that falls within a province.[3] This part of the Act also establishes the process that project proponents can use to apply for an authorization, and it imposes some requirements

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[1] *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII). For an overview of this decision, see: Tina Northrup, "Tailoring Federal Assessment Processes to Advance Sustainability: A Reflection on the Supreme Court of Canada's Opinion in the *Impact Assessment Act* Reference" *East Coast Environmental Law Blog* (27 October 2023).
[2] Government of Canada, "Statement on the Interim Administration of the *Impact Assessment Act* Pending Legislative Amendments" (26 October 2023).
[3] For the purposes of these prohibitions, the phrase "offshore area" means the part of the internal waters of Canada or territorial sea of Canada that is not situated in a province, and it also includes the continental shelf of Canada and its superjacent waters; the phrase "offshore renewable energy project" means any of the following activities if they are carried on in the offshore area: "any research or assessment conducted in relation to the exploitation or potential exploitation of a renewable resource to produce energy", "any exploitation of a renewable resource to produce energy", "any storage of energy produced from a renewable resource", and "any transmission of such energy, other than the transmission of electricity to a province or a place outside Canada": see *Canadian Energy Regulator Act*, SC 2019, c 28 at section 2 ["*CERA*"].

for decision-making by the Commission of the Canada Energy Regulator (the "CER Commission").[4]

The *CERA*'s authorization process for offshore renewable energy projects is not extensive. Generally, it envisions individual project proponents approaching the CER Commission with project-specific applications for authorization, which the CER Commission must then consider by taking into account several factors, including: potential environmental effects of the proposed activity, including cumulative environmental effects; human safety and security; protection of property; protection of the environment; potential health, social, and economic effects, considered through an intersectional lens; Indigenous rights, interests, and concerns; whether the proposed activity would help or hinder the Government of Canada's ability to meet its environmental commitments and commitments in respect of climate change; and, the findings of any relevant regional assessment or strategic assessment conducted under the *IAA*.[5] If a proposed activity also triggers an impact assessment ("IA") under the *IAA*, the CER Commission's consideration and decision-making are altered somewhat to intersect with the IA process.[6]

Under the *IAA* and its *Physical Activities Regulations*—which list the kinds of activities that trigger IA processes—a proposed activity involving the construction, operation, decommissioning, or abandonment of a wind energy facility in an "offshore area" or in "boundary water" will trigger the IA process if the proposed facility includes ten or more wind turbines.[7] Likewise, the expansion of a wind energy facility in an offshore area or in boundary water will trigger the process if the expansion would increase production capacity by more than 50% and increase the total number of wind turbines to ten or more.[8]

IA processes under the *IAA* are project-specific. Like Part 5 of the *CERA*, the *IAA* envisions project proponents approaching the Impact Assessment Agency of Canada ("IAAC") with initial project descriptions that trigger the process and require the IAAC to administer assessments and facilitate decision-making. Neither the *IAA* nor the *CERA* establish centralized processes through which governmental authorities identify areas deemed most suitable for marine wind energy developments and decide, strategically, where and when to invite developer proposals. Centralized processes of this kind have been used in the EU, UK, and US to facilitate offshore wind development while also protecting other interests in marine areas, and arguably, they represent best practices for integrated and conscientious management of marine activities and protection of marine ecologies. It may be that the *CERA* will be amended in the future to support such processes in areas where marine renewable energy developments are not governed by other licencing regimes (whether provincial or joint federal-provincial), but such amendments are

[4] See in particular *CERA* at sections 298-99.
[5] *Ibid* at subsection 298(3).
[6] *Ibid* at section 299.
[7] Under the *Physical Activities Regulations*, the phrase "offshore area" has the same meaning described above in note 3: see *Physical Activities Regulations*, SOR/2019-285 at section 1 ["*Physical Activities Regulations*"], incorporating by reference the definition of "offshore area" contained in the *CERA*. The phrase "boundary water" refers to waters that are transected by the international boundary line between Canada and the United States of America: see *Physical Activities Regulations* at section 1, incorporating by reference the definition of "boundary waters" contained in subsection 2(1) of the *Canada Water Act*, RSC 1985, c C-11.
[8] *Physical Activities Regulations* at section 2, paragraphs 44-45.

unlikely under the *IAA*, as the *IAA* is not designed for industry-specific governance and regulation.

Notably, centralized site identification and competitive bidding processes have been used for decades in the offshore area where oil and gas activities have been managed jointly by Canada and Nova Scotia under the CAN-NS Accord. These processes have been administered by the Canada-Nova Scotia Offshore Petroleum Resources Board ("CNSOPB" or the "Board"), and they are described later in this report. In April 2022, the Government of Canada and Government of Nova Scotia announced that they would amend the *Accord Acts* to enable joint federal-provincial regulation of offshore renewable energy projects in jointly-managed waters.[9] Without doubt, the long history of cooperative regulation of oil and gas activities in offshore Nova Scotia—along with the CNSOPB's corresponding experience managing site selection, competitive bidding, and staged licensing—are among the reasons why the two governments saw value in expanding the existing regime.

In May 2023, Canada's Minister of Energy and Natural Resources introduced Bill C-49 in the House of Commons. Bill C-49 is a proposed "Act to amend the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and to make consequential amendments to other Acts".[10] As concerns the evolving legal regimes for wind energy developments in marine areas within and around Nova Scotia, the Bill is significant because it proposes amendments to the *Federal Accord Act* that will be necessary to facilitate joint federal-provincial regulation in the offshore area that is governed under the CAN-NS Accord. Included among the proposed amendments are changes that will rename the CNSOPB as the Canada-Nova Scotia Offshore Energy Regulator ("CNSOER" or the "Regulator") and give the Regulator an expanded mandate to regulate offshore renewable energy projects of various kinds.

Additionally, an ongoing Regional Assessment of Offshore Wind Development in Nova Scotia ("NS Offshore Wind RA" or the "Regional Assessment") that is being carried out under the *IAA* is expected to inform the centralized site selection and bidding processes that Bill C-49 proposes to establish for offshore renewable energy projects in jointly-managed waters. The Regional Assessment is scheduled to conclude in late 2024 or early 2025, and the Government of Nova Scotia has indicated that its conclusion, coordinated with *Accord Acts* amendments, will enable the first offshore wind energy Call for Bids in jointly-managed waters in 2025.[11]

In addition to these initiatives focusing on offshore wind developments in jointly-managed waters, the Government of Nova Scotia is exploring opportunities to foster wind energy development in marine areas where the Province asserts independent jurisdiction. The government's ambitions in this regard, the complexities of its claims to jurisdiction, and the

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[9] Government of Canada, "Canada and Nova Scotia Announce Intent to Expand the Mandate of Offshore Energy Regime to Support the Transition to a Clean Economy and Create Sustainable Jobs" (11 April 2022).
[10] Bill C-49, "An Act to amend the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and to make consequential amendments to other Acts", as introduced and presented for First Reading in the House of Commons (30 May 2023) ["Bill C-49].
[11] Government of Nova Scotia, *Nova Scotia Offshore Wind Roadmap Module 1 (Draft)* (May 2023) at page 16 ["*Offshore Wind Roadmap*: draft Module 1"].

provincial law reform that would be necessary to support such development are addressed in the companion piece to this report.

2.0 History of the Joint Management Regime in Offshore Nova Scotia

As noted above, offshore Nova Scotia has been the subject of competing jurisdictional claims by Canada and the Province of Nova Scotia for more than half a century. Parliament and the Province both assert ownership of and jurisdiction over various locations and resources that are available within the offshore area as a whole, and their respective claims are informed by centuries-old British common law, Canadian constitutional law, and historical developments in international law. Several of the questions concerning Canada and Nova Scotia's respective claims to the offshore have not been fully resolved, but more than forty years of cooperation between Parliament and the Province have demonstrated that definitive resolution is not really necessary for the two governments to coordinate effective resource management in the offshore.

2.1 Contested Jurisdiction in the Offshore

2.1.1 *The "Territorial" Nature of Provincial Jurisdiction under Canada's Constitution*

Canada's colonial history led to the country's constitution as a federal state, with governance powers divided between Parliament and the provinces. Speaking generally, Parliament is responsible for matters that affect the nation as a whole, and each provincial government is responsible for matters that are local to its province. Provincial authority in this regard is a partial preservation of the powers that the provinces held before confederation, when they were independent colonies of Britain.

The constitutional division of powers between Parliament and the provinces is set out in Part VI of the *Constitution Act, 1867*. Sections 91 and 92 are the primary division sections, but section 92A assigns additional powers that are relevant to questions concerning provincial jurisdiction over electricity-generation activities.[12]

It has been said that the spheres of provincial authority established by the Constitution are "territorial in nature".[13] This description is based on the language of the division provisions that pertain to provincial authority, all of which refer to provincial jurisdiction being exercised "in" each province, and many of which refer to jurisdiction being exercised over matters that are likewise "in" the province. For example, subsection 92(13) recognizes provincial jurisdiction over property and civil rights in the province, and subsection 92(16) recognizes provincial jurisdiction over generally all matters that are of a merely local or private nature in the province. Subsection 92(5) recognizes provincial jurisdiction over the management and sale of public lands belonging to the province, and subsection 92A(1) provides:

> **92A(1**) In each province, the legislature may exclusively make laws in relation to

[12] Section 92A of the *Constitution Act, 1867* was not part of the original division of powers established between Parliament and the provinces; it was added in 1982 as a product of the negotiations leading to the patriation of the Constitution.

[13] Meinhard Doelle, Dawn Russell, Phillip Saunders, David VanderZwaag, and David Wright, "The Regulation of Tidal Energy Development Off Nova Scotia: Navigating Foggy Waters" *University of New Brunswick Law Journal* 55:27 (2006) at page 35 ["Navigating Foggy Waters"].

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

The "territorial" nature of provincial jurisdiction under Canada's Constitution raises potentially tricky questions about the authority that any Canadian province has to regulate wind energy development in marine areas. The most fundamental of these questions is: *What marine areas, if any, are "in" the province?* This question is fundamental because each provincial government's constitutional authority to make laws related to electricity-generating sites and facilities[14] cannot extend to marine areas if the marine areas in question are not "in" the province.

2.1.2 *High-profile Reference Cases Contesting Jurisdiction in the Offshore*

In the latter half of the twentieth century, as petroleum exploration and extraction technologies advanced to the point of making offshore oil and gas activities a feasible and potentially lucrative reality, disagreements arose between the Government of Canada and the governments of several coastal provinces concerning which of them could claim ownership of and jurisdiction over mineral resources in the offshore. Four high-profile reference cases conducted in the 1960s-1980s went a long way towards clarifying the respective positions of Parliament and the provinces, but they did not resolve all of the issues.[15] Ultimately, Nova Scotia made the strategic decision not to litigate its claims, choosing instead to inaugurate a cooperative federal-provincial arrangement that was designed to facilitate mutually-beneficial oil and gas development in the offshore. That cooperative arrangement will soon be the foundation for a jointly-managed offshore renewable energy regime.

Across the four reference cases that spanned the 1960s-1980s, the participating provinces sought to have their jurisdiction recognized within three different categories of marine areas that were said to belong to or be within each province: a three nautical-mile territorial sea; the continental shelf; and, waters *intra fauces terrae* ("within the jaws of the land"). To understand the resolutions of the reference cases, it is helpful to understand some key characteristics of each of these categories.

Coastal states' ownership of and jurisdiction over "territorial seas" are rights and interests that are recognized under international law. International recognition of these rights and interests is a relatively recent development—in the late nineteenth century, when the colonies of British North

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[14] See *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted RSC 1985, App II, No. 5 at clause 92A(1)(c), quoted above ["*Constitution Act, 1867*"].

[15] See: *Reference re Offshore Mineral Rights*, 1967 CanLII 71 (SCC) ["*BC Offshore Minerals Reference*"]; *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, 1984 CanLII 138 (SCC) ["*Georgia Strait Reference*"]; *Reference re Mineral & Other Natural Resources of the Continental Shelf*, 1983 CanLII 3089 (NLCA) ["*Newfoundland Continental Shelf Reference*"]; and, *Reference re Newfoundland Continental Shelf*, 1984 CanLII 132 (SCC) ["*Hibernia Reference*"].

America were considering confederation, international consensus on coastal states' rights and interests in territorial seas had not yet taken shape. Importantly, at the time of Confederation in 1867, British common law held that the "realm" of Britain (including in British colonies) ended at the low-water mark.[16] British courts recognized that the British Parliament had the right, under international law, to assert ownership of and jurisdiction over a three nautical-mile territorial sea, but this assertion could only be accomplished through legislation—the courts could not extend the "realm" through their application of the common law.[17] As is discussed below, this historico-legal understanding of British territorial seas has informed how Canadian courts have considered provincial claims to ownership of and jurisdiction over marine territories.

Coastal states' rights to explore and exploit the resources of their continental shelves are also rights that are recognized under international law. Speaking generally, the continental shelf is a submerged land area that extends from dryland territories until the point where it slopes or drops into deep oceanic waters. Under the 1958 Geneva Convention on the Continental Shelf—which is what the courts relied on in the reference cases described in this report—the continental shelf was defined as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas", also including "the seabed and subsoil of similar areas adjacent to the coasts of islands".[18]

Key passages of the 1958 Geneva Convention on the Continental Shelf that were later incorporated into the United Nations Convention on the Law of the Sea grant sovereign rights to coastal states over the continental shelves extending from their dryland territories, for the purposes of "exploring and exploiting" the natural resources of the seabed and subsoil.[19] These rights are exclusive, and they do not depend on occupation or express proclamation by a coastal state.[20] The rights pertain to the "mineral and other non-living resources of the sea-bed and subsoil" of the continental shelf, "together with living organisms belonging to sedentary species".[21] Importantly, coastal states' rights and interests in their continental shelves are different from their rights and interests in their territorial seas. Rights and interests in the continental shelf are not proprietary: coastal states do not "own" the continental shelves that extend from their dryland territories.[22]

Finally, waters "*intra fauces terrae*" ("within the jaws of the land") are waters such as bays, estuaries, and inlets that are surrounded at least in part by the territorial land mass. Under British common law at the time of Confederation in 1867 (and in the proceeding years when subsequent provinces entered into the union), waters *intra fauces terrae* were considered to be within the

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[16] *Reg v Keyn; The 'Franconia'* (1876) 2 Ex D 63, as cited in *BC Offshore Minerals Reference* at pages 804-05; see also *Georgia Strait Reference* at pages 400-01.
[17] *BC Offshore Minerals Reference* at pages 806-07; see also *Georgia Strait Reference* at page 400-01.
[18] Convention on the Continental Shelf at Article 1 ["Geneva Convention on the Continental Shelf"]. The definition of "continental shelf" contained within this Convention has now been superseded by an amended definition set out in Article 76 of the United Nations Convention on the Law of the Sea ["UNCLOS"].
[19] Geneva Convention on the Continental Shelf at Article 2.1; UNCLOS at Article 77.1.
[20] Geneva Convention on the Continental Shelf at Articles 2.2 and 2.3; UNCLOS at Articles 77.2 and 77.3.
[21] Geneva Convention on the Continental Shelf at Article 2.4; UNCLOS at Article 77.4.
[22] *Hibernia Reference* at pages 95-97.

"realm" and were thus under the jurisdiction of the common law.[23] Among other things, this meant that the common law recognized such waters as being part of the territories of colonies like Nova Scotia, which also meant that they were part of the territories that the colonies brought with them into Confederation. These historico-legal dynamics mean that there is strong legal support for provinces' claims to ownership of and jurisdiction over waters *intra fauces terrae*. That being said, legal scholarship has noted that it can be difficult to delineate the boundaries of such waters with precision.[24] It is not simply a matter of looking at a map and drawing a line around a province's land mass without including indentations for bays, estuaries, and inlets: both geography and history are relevant to the delineation.[25]

The first of the four reference cases that are pertinent to this report is known as the "*BC Offshore Minerals Reference*".[26] In it, the Government of Canada asked the Supreme Court of Canada ("SCC") for its opinion on a series of questions stemming from two main issues:

- whether Canada (as represented by the federal government) or British Columbia (as represented by the provincial government) could claim ownership of or jurisdiction over a three nautical-mile territorial sea extending from the coast of British Columbia; and,

- whether Canada or British Columbia had jurisdiction over and the right to explore and exploit the mineral resources of the continental shelf extending from mainland British Columbia.[27]

The questions framed by the Government of Canada explicitly excluded consideration of ownership of and jurisdiction over "harbours, bays, estuaries and other similar inland waters".[28] This led to a second reference case, known as the "*Georgia Strait Reference*",[29] that focused on British Columbia's claims to ownership of and jurisdiction over the Strait of Juan de Fuca, Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait—areas that were not considered in the *BC Offshore Minerals Reference*. The governments of New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island participated in the *BC Offshore Minerals Reference* as intervenors, all supporting British Columbia's position, and the governments of New Brunswick, Newfoundland, and Nova Scotia participated in the *Georgia Strait Reference* as well, again supporting British Columbia's position.

The SCC's conclusions in the *BC Offshore Minerals Reference* were favourable to Canada. Under Canada's Constitution, the territories of a province—the lands, and, potentially, the waters,[30] over which the province has jurisdiction—include the territories that the province held

[23] "Navigating Foggy Waters" at page 38.
[24] *Ibid.*
[25] *Ibid* at pages 38 and 40.
[26] See full citation above at footnote 15.
[27] *BC Offshore Minerals Reference*" at page 796.
[28] *Ibid*.
[29] See full citation above at footnote 15.
[30] In the *Georgia Strait Reference*, the Supreme Court of Canada applied a rebuttable presumption that the "ordinary" or "primary" meaning of the word "territory" refers to dry land. The Court held that the presumption had been rebutted in that case by the Attorney General of British Columbia, who argued successfully that British

at the time it entered Confederation.[31] In this case, the SCC concluded that British Columbia did not have ownership of or jurisdiction over a three nautical-mile territorial sea extending from the province's coast, because when the colony of British Columbia joined the Dominion of Canada in 1871, territorial seas were not part of the territories of British colonies under the common law. Although ownership of and jurisdiction over a territorial sea could have been established through legislation enacted by the British Parliament, the British Parliament had not moved to establish such rights for the colony. Therefore, British Columbia did not bring a territorial sea with it into Confederation as part of its provincial territory, and no subsequent developments in British, Canadian, or international law ever resulted in British Columbia acquiring ownership of or jurisdiction over a territorial sea. Concerning the competing claims to the continental shelf, the Court held that international law recognizing coastal states' rights to explore and exploit the natural resources of their continental shelves did not crystallize until more than half a century after British Columbia entered Confederation, so British Columbia could not claim to have brought any rights to continental shelf resources with it into Confederation; moreover, the province had not acquired such rights through any subsequent developments in international or Canadian law.

In the *Georgia Strait Reference*, the SCC's conclusions were favourable to British Columbia. In the Court's opinion, British Columbia succeeded in demonstrating that the British Parliament had recognized the straits in question as being part of British Columbia's colonial territory before the colony entered Confederation in 1871. As a result, the submerged lands of the straits and the natural resources contained therein were property that British Columbia brought with it into Confederation.

The next two reference cases proceed somewhat strangely, with the Government of Canada and Government of Newfoundland giving separate but related reference questions to the SCC and the Newfoundland Court of Appeal ("NLCA") in quick succession. The Government of Newfoundland submitted its question first, asking the NLCA for its opinion on whether "the lands, mines, minerals, royalties or other rights, including the right to explore and exploit and the right to legislate, with respect to the mineral and other natural resources of the seabed and subsoil from the ordinary low-water mark of the Province of Newfoundland to the seaward limit of the continental shelf or any part thereof belong or otherwise appertain to the Province of Newfoundland".[32] Just a few months later, the Government of Canada asked the SCC for its opinion on essentially the same question, though the ambit of the federal government's query was confined more narrowly to a defined area in offshore Newfoundland, the "Hibernia field", where oil and gas exploration was being conducted.[33] This report refers to the reference case before the NLCA as the "*Newfoundland Continental Shelf Reference*", and it adopts the common usage of the name "*Hibernia Reference*" for the reference case before the SCC.

The NLCA provided its opinion in the *Newfoundland Continental Shelf Reference* in February 1983. In it, the Court took a two-pronged approach to the Government of Newfoundland's

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Columbia's territories at the time of the province's entry into Confederation included the submerged lands and waters between mainland British Columbia and Vancouver Island: see *Georgia Strait Reference* at pages 419-21.

[31] *BC Offshore Minerals Reference* at page 799; see also "Navigating Foggy Waters" at page 35.

[32] *Newfoundland Continental Shelf Reference* at paragraph 1.

[33] *Hibernia Reference* at pages 86-87.

question, separating its consideration of Newfoundland's potential claims to a territorial sea from the Province's claims to the continental shelf. Ultimately, the Court determined that Newfoundland had ownership of and jurisdiction over a three nautical-mile territorial sea but had no jurisdiction over the continental shelf. On the latter point, the Court held that the SCC's reasons for rejecting British Columbia's claims to the continental shelf in the *BC Offshore Minerals Reference* were relevant in this case too, though not definitive. The NLCA held that international law recognizing coastal states' rights to explore and exploit the natural resources of their continental shelves had crystallized by the time Newfoundland entered Confederation in 1949; however, in the Court's view, Newfoundland had not taken steps that were necessary for it to lay claim to those rights as an independent state before it entered Confederation.

The SCC's decision in the *Hibernia Reference* followed roughly a year later, in March 1984. The Court reached the same conclusion as the NLCA concerning Newfoundland's claims to the continental shelf, but for different reasons. Unlike the NLCA, the SCC did not conclude that Newfoundland had failed to take necessary steps to claim rights to explore and exploit continental shelf resources before it entered Confederation. In the SCC's view, international law recognizing coastal states' rights to explore and exploit continental shelf resources had not in fact crystallized by 1949.[34]

2.1.3 *Ramifications for Nova Scotia*

Nova Scotia's claims to ownership of and jurisdiction over certain marine areas within and around the province have not been litigated, but it is possible to draw some inferences about the strengths and weaknesses of those claims from the reference cases discussed above.

Legal scholarship suggests that the Province, as represented by the Government of Nova Scotia, might potentially be able establish a claim to ownership of and jurisdiction over a three nautical-mile territorial sea, but success in this regard would not be guaranteed.[35] A stronger argument might be made with respect to the southern half of the Bay of Fundy, on the basis that the British Parliament asserted ownership of the Bay of Fundy since at least the seventeenth century and established various pre-Confederation grants and commissions that spoke of the Bay of Fundy being included within the colony of Nova Scotia.[36] These acts of Britain could possibly be recognized as having extended the territory of Nova Scotia beyond the low-water mark and into some or all of the Bay of Fundy, meaning that Nova Scotia and New Brunswick could both claim to have brought territorial ownership of part of the Bay of Fundy with them into Confederation.[37]

By contrast, the Province would almost certainly not be successful in claiming jurisdiction over the continental shelf that extends from the provincial land mass, because international law concerning coastal states' rights to explore for and exploit the resources of continental shelves did not crystallize until long after Nova Scotia entered into Confederation in 1867.

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[34] Other arguments that the SCC considered in the alternative as possible ways in which continental shelf rights could have accrued to Newfoundland all led to the same conclusion that Newfoundland could not have claimed or could no longer claim such rights.
[35] "Navigating Foggy Waters" at pages 38-39.
[36] *Ibid* at pages 39-41, 45-46, and 68.
[37] *Ibid*.

Finally, the Province has grounds to feel reasonably confident in its claims to jurisdiction over waters that are *intra fauces terrae*; however, as noted above, there are practical difficulties in delineating the boundaries of such waters, and there may be disagreements as to where such boundaries should be drawn.[38]

It is worth noting that, even in marine areas where Nova Scotia may be able to demonstrate ownership and jurisdiction, Canada would still have significant roles to play in facilitating regulation of marine wind energy development. Public rights and interests in marine areas—such as public rights of navigation and shipping—are rights that can be qualified and restricted through legislation, but the *Constitution Act, 1867* gives the Government of Canada exclusive authority to make laws in respect of navigation and fisheries.[39] In the same way that federal authorities need to provide relevant authorizations for activities that affect navigation and fisheries in watercourses that are vested within a province, so too would federal contributions be necessary to regulate activities in "provincial" marine waters.

2.2 The Canada–Nova Scotia Offshore Petroleum Resources Accord and Its Implementation Acts

Ultimately, instead of asking the courts to resolve the problems of contested jurisdiction in offshore Nova Scotia, Nova Scotia pursued collaborative arrangements with Canada, leading ultimately to the establishment of the CAN-NS Accord in 1986. The *Accord Acts* regime that followed was designed to facilitate oil and gas activities in the region, but it holds promise for the joint management of marine renewable energy resources as well.

The CAN-NS Accord was the outcome of several years in which the Government of Canada and the governments of the four Atlantic Canadian provinces considered how best to share (or decline to share) the potential benefits of offshore oil and gas activities across the country.

In 1977, the Government of Canada established a Memorandum of Understanding ("MOU") with the governments of New Brunswick, Nova Scotia, and Prince Edward Island on the "Administration and Management of Mineral Resources of the Maritime Provinces".[40] The MOU envisioned the establishment of a joint administrative authority—to be called the Maritime Offshore Resources Board—that would have representation from all three Maritime provinces and be responsible for regulating oil and gas activities across the Maritime offshore region.[41] Ultimately, the MOU was never implemented.[42]

In 1982, the Government of Canada and Government of Nova Scotia established the Canada-Nova Scotia Agreement on Offshore Oil and Gas Resources Management and Revenue Sharing (the "1982 Agreement").[43] Within the context of the Government of Canada's attempts to

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[38] "Navigating Foggy Waters" at page 38.
[39] *Constitution Act, 1867* at paragraphs 91(10) and 91(12). For further discussion on this point, see "Navigating Foggy Waters" at page 42.
[40] Peter Clancy, *Offshore Petroleum Politics: Regulation and Risk in the Scotia Basin* (2021) Vancouver: UBC Press at page 80 ["*Offshore Petroleum Politics*"].
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid* at page 85.

establish cooperative federal-provincial arrangements for offshore oil and gas activities in Atlantic Canada, the 1982 Agreement was the first of its kind, representing an important step forward for the federal government and a significant, strategic move by the Government of Nova Scotia, intended to demonstrate that Nova Scotia was open for business.[44] The 1982 Agreement was implemented through mirrored federal and provincial statutes—the *Canada-Nova Scotia Oil and Gas Agreement Act* and *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*—which established a defined "Offshore Area" in which petroleum exploration and exploitation would be managed jointly by a Canada-Nova Scotia Offshore Oil and Gas Board, whose authority would intersect with management by the Canada Oil and Gas Lands Administration.[45]

The 1982 Agreement was superseded four years later by the CAN-NS Accord. The *Newfoundland Continental Shelf Reference* and *Hibernia Reference* described above were important motivators in this regard. After the SCC released its opinion in the *Hibernia Reference*—concluding that Canada, not Newfoundland, held the legal rights to explore and exploit the natural resources of the continental shelf—the Government of Newfoundland agreed to cooperative management of oil and gas activities in offshore Newfoundland. The arrangement between Canada and Newfoundland was expressed in an agreement called the Atlantic Accord, and it was implemented through mirrored federal and provincial statutes: the *Canada-Newfoundland Atlantic Accord Implementation Act* and the *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*. In many ways, the Atlantic Accord and its implementing statutes drew on the 1982 Agreement between Canada and Nova Scotia, but it also made some improvements on the model, including arrangements for more equitable representation on and independent functioning of the offshore regulator, the Canada-Newfoundland Offshore Petroleum Board.[46] The Government of Nova Scotia understood the significance of those improvements, so it negotiated with Canada for an amended agreement that would offer greater benefits to Nova Scotia.[47] The CAN-NS Accord and its *Accord Acts* were the results of those negotiations.

The CAN-NS Accord and its *Accord Acts* apply to a defined "Offshore Area", the boundaries of which are described in several schedules to the Acts. Importantly, Schedule 1 of each of the *Accord Acts* defines the inner limit of the Offshore Area as the low-water mark of Nova Scotia, except in respect of several "bay" areas that are described.[48] These bay areas include Chedabucto Bay, Chignecto Bay, Minas Channel, St. George's Bay, St. Mary's Bay, and "any bay where a straight closing line of ten kilometres or less may be drawn between points on the low water mark of the bay so that the area of the bay landward of the closing line is greater than that of a semi-circle whose diameter is the closing line".[49] These exclusions from the jointly-managed "Offshore Area" suggest that the Government of Nova Scotia may be able to exercise

[44] *Ibid* at page 84.
[45] *Ibid* at page 85.
[46] *Ibid* at pages 88-91.
[47] *Ibid* at pages 91-95.
[48] For the purposes of Schedule 1 of each Act, the meaning of the word "bay" includes "harbour, port, cove, sound, channel, basin or other inlet": see *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988 c 28 at Schedule 1, clause (f)(i) ["*Federal Accord Act*"] and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act* at Schedule 1, clause (f)(i) ["*Provincial Accord Act*"].
[49] *Federal Accord Act* at Schedule 1, paragraphs (a)-(f); *Provincial Accord Act* at Schedule 1, paragraphs (a)-(f).

independent jurisdiction over marine wind energy development in these "bays"—a subject discussed in more detail in the companion piece to this report.

The CAN-NS Accord and its *Accord Acts* established a practical resolution to contested jurisdiction in the offshore. In doing so, the regime provided a framework through which Canada and Nova Scotia, acting jointly, could assign necessary rights and interests to the offshore oil and gas developers that the governments hoped to attract to the region. The current initiative by the Government of Canada and Government of Nova Scotia to amend the *Accord Acts* and establish the re-mandated CNSOER is clearly an effort to apply the same formula in order to reap the potential benefits of offshore renewable energy industries.

2.3 Regulation by the Canada–Nova Scotia Offshore Petroleum Board

This section provides a brief introduction to the role of the CNSOPB. The Board's regulation of offshore petroleum activities is discussed in more detail below, as are the processes that have been proposed in Bill C-49 for the re-mandated CNSOER's regulation of offshore renewable energy activities.

Under the *Accord Acts*, the CNSOPB is responsible for administering centralized site identification and several tightly-controlled licencing processes for offshore petroleum activities in the defined Offshore Area. The key licences that the Board issues for such activities are Exploration Licences, Significant Discovery Licences, and Production Licences. The issuance of these licences proceeds in stages. When the Board decides to open an area to prospective exploration, it initiates a competitive bidding process by issuing a Call for Bids. This bidding process may—but will not necessarily—result in one or more successful bidders receiving Exploration Licences that enable them to take the next steps towards conducting offshore petroleum exploration activities. However, before exploration or production activities are carried out under *Accord Acts* licences, proponents must apply to the Board for further activity authorizations. These application processes may trigger environmental impact assessments of various kinds and will require various forms of environmental and risk-management planning.

The United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention")—which, among other things, incorporates the international community's recognition of coastal states' rights to explore and exploit the natural resources of their continental shelves— imposes responsibilities that inform the CNSOPB's mandate at a high level. Under the Convention, Canada has an "obligation to protect and preserve the marine environment",[50] and it must assess the potential effects of planned activities under its jurisdiction or control if it has reasonable grounds to believe that those activities "may cause substantial pollution of or significant and harmful changes to the marine environment".[51] The Convention does not define what is meant by "significant and harmful",[52] which leaves room for states to exercise discretion in how they define those words and establish triggers for environmental impact assessment processes. As is discussed in more detail in later sections of this report, the CNSOPB exercises layered responsibilities concerning environmental impact assessments of proposed petroleum activities.

[50] UNCLOS at Article 192; see also "Navigating Foggy Waters" at page 30.
[51] UNCLOS at Article 206; see also "Navigating Foggy Waters" at page 30.
[52] "Navigating Foggy Waters" at page 30.

When considering these responsibilities, it is useful to remember that they are not rooted solely in Canadian law. As a party to the UNCLOS, Canada has obligations to the international community, and the CNSOPB helps to fulfill those obligation through various practices that are designed (in theory) to protect marine ecologies from environmental harms.

The *Accord Acts* regime contains minimal language concerning the CNSOPB's purpose and mandate. Notably, the *Accord Acts* do not include preambles or general "purpose" sections that describe the underlying motivations for and purposes of the legislation. Part III of the Acts includes a part-specific purpose section that gives the CNSOPB a general environmental protection mandate and a corresponding mandate to uphold accountability in accordance with the "polluter pays" principle. That purpose section states:

> **138.1** The purpose of this Part is to promote, in respect of the exploration for and exploitation of petroleum,
>
> **(a)** safety, particularly by encouraging persons exploring for and exploiting petroleum to maintain a prudent regime for achieving safety;
>
> **(b)** the protection of the environment;
>
> **(b.1)** accountability in accordance with the "polluter pays" principle;
>
> **(c)** the conservation of petroleum resources; and
>
> **(d)** joint production arrangements.[53] [emphasis added]

This purpose section is significant, because Part III of the *Accord Acts* is the part that deals primarily with the CNSOPB's role in managing requirements for environmental assessments, environmental protection planning, and environmental monitoring and follow-up before and after issuing operating licences and activity authorizations. However, it is noteworthy that Part II of the Act—which is the part that deals primarily with the CNSOPB's decisions to issue Calls for Bids, Exploration Licences, Significant Discovery Licences, and Production Licences—has no purpose section to guide the Board's activities in those regards.

The *Accord Acts* in their current forms do not explicitly empower the CNSOPB to conduct regional assessments ("RAs") or strategic environmental assessments ("SEAs"), nor do they explicitly require the Board to conduct environmental assessments ("EAs") beyond any that are required under the federal IA regime.[54] However, legal scholarship states that in 2005, the CNSOPB received direction from the Government of Canada and Government of Nova Scotia to conduct SEAs of prospective licence areas where comprehensive reviews had not been

[53] *Federal Accord Act* at section 138.1; see also *Provincial Accord Act* at section 133A.
[54] The *Accord Acts* still refer to the federal environmental assessment regime that existed from 2012-2019 under the *Canadian Environmental Protection Act, 2012*; however, the CNSOPB's website recognizes the Board's obligations under the *IAA* (as it currently stands): see CNSOPB, "Environmental Assessments" (undated).

conducted previously.[55] These directions are said to be based on a determination that a federal Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals ("Cabinet Directive on SEAs") applies to CNSOPB decisions to open marine areas to petroleum exploration activities.[56] The CNSOPB also has an established practice of conducting EAs for several activities that are regulated by the Board but do not trigger federal IAs.

The CNSOPB's established practices in respect of SEAs and EAs may provide strong foundations for environmental protection and sustainable decision-making under the amended *Accord Acts* regime, but it remains to be seen how these practices will be applied to the Board's anticipated regulation of offshore renewable energy projects.

[55] Meinhard Doelle, Nigel Bankes, and Louie Porta, "Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions: Applying Lessons Learned from Atlantic Canada to the Beaufort Sea" *Review of European Community & International Environmental Law* 22:1 (2013) at page 110 ["Using Strategic Assessments to Guide Oil and Gas Exploration Decisions"].
[56] *Ibid*.

3.0 Petroleum Activities Licensing by the Canada–Nova Scotia Offshore Petroleum Board under the Current *Accord Acts* Regime

This section of the report provides an overview of the CNSOPB's current licencing and authorization processes for offshore petroleum activities, so as to support comparison and understanding of the processes that may be established for the regulation of offshore wind developments. The CNSOPB's website includes a diagram that provides a useful overview and visual summary of the petroleum activities licences it administers, which are based on a model established in the *Canadian Petroleum Resources Act*.[57]

3.1 Calls for Bids and Exploration, Production, and Significant Discovery Licences

3.1.1 *Pre-bidding*

The CNSOPB's licencing process is based on competitive bidding by offshore oil and gas proponents.[58] Three noteworthy CNSOPB responsibilities and practices inform the Board's administration of the bidding process. First, the *Accord Acts* require the CNSOPB to submit a strategic plan each January to the federal Minister of Energy and Natural Resources (the "Federal Minister") and the provincial Minister of Natural Resources and Renewables (the "Provincial Minister") (together, the "Ministers"), outlining the decisions that the Board anticipates making in respect of Calls for Bids and the issuance of licences following Calls for Bids.[59] This requirement builds a forward-looking, strategic planning element into the Board's administration of competitive bidding. Second, on a cycled schedule that repeats each year, the CNSOPB accepts nominations of (submerged) lands that proponents would like the Board to consider for inclusion in a Call for Bids.[60] Third, if lands nominated for inclusion in a Call for Bids have not been evaluated through an SEA (or a sufficiently current SEA), the Board must conduct an SEA concerning them before including them in a Call for Bids.[61] Currently, the Board administers the bidding process just once each year.[62]

3.1.2 *Calls for Bids*

An initial Call for Bids invites proponents to bid competitively for rights to explore "parcels" (i.e., delineated areas within the defined Offshore Area) that the CNSOPB has chosen to open for exploration. A Board decision to make a Call for Bids is one of several decisions that are called "fundamental decisions" under the *Accord Acts* regime. A "fundamental decision" by the Board is one that can be set aside (vetoed) by the Federal Minister and Provincial Minister. In most cases, the Ministers must act jointly to set aside a fundamental decision.

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[57] CNSOPB, "Canadian Petroleum Resources Act Model" (undated).
[58] An overview of the bidding process administered by the Board is provided at: CNSOPB, "Calls for Bids" (undated).
[59] *Federal Accord Act* at section 43; *Provincial Accord Act* at section 42.
[60] CNSOPB, "Calls for Bids" (undated). See also: Wood Environment & Infrastructure Solutions, "Strategic Environmental Assessment – Middle and Eastern Scotian Slope and Sable Island Bank Areas: Final Report" (18 May 2022) at page 4.
[61] CNSOPB, "Calls for Bids" (undated).
[62] *Ibid*.

Under the *Accord Acts*, a Call for Bids process is a mandatory prerequisite to the issuing of "interests" (i.e., licences) by the CNSOPB.[63] This requirement is subject to limited exceptions.[64] The Acts set a default timeline for the closure of Calls for Bids one hundred and twenty (120) days after Calls are made, but they also give the Board discretion to set an alternative timeline.[65]

The *Accord Acts* make it clear that the CNSOPB is not required to issue an interest following a Call for Bids.[66] This means that, despite making a Call for Bids and receiving submissions from offshore oil and gas proponents, the Board is under no obligation to take the further step of choosing one or more successful bidders and issuing licences to them.

3.1.3 *Exploration Licences*

An Exploration Licence ("EL") confers exploration and limited production interests in respect of a "parcel" of submerged lands in the offshore. The interests conferred by ELs are not proprietary rights in the submerged lands themselves, meaning that they do not convey ownership of the seabed and subsoil in question. Rather, they are interests pertaining to the *use* of the submerged lands for the purposes of exploring for and exploiting petroleum resources contained therein.

Under the *Accord Acts*, an EL confers the following rights in the licence area: exclusive rights to explore, drill, and test for petroleum (through activities such as seismic testing and carrying out geophysical and geotechnical surveys); an exclusive right to develop the licence area to produce petroleum (in line with the parameters of exploratory production, not commercial production); and, an exclusive right to obtain a Production Licence for the licence area, conditional upon meeting requirements that are set out in other provisions of the Acts.[67]

A CNSOPB decision to issue an EL is another "fundamental decision" that the Ministers can set aside.[68]

Importantly, the issuance of an EL does not itself authorize specific exploration activities within the parcel in question. The holder of an EL will still need to apply for further activity authorizations from the Board, which is when project-specific environmental assessments or impact assessments, environmental protection planning, wildlife response planning, and spill mitigation response planning requirements will be triggered.[69]

Under time-limit provisions established in the *Accord Acts*, ELs are issued for terms of up to nine years and cannot be extended or renewed beyond that nine-year period, subject to limited exceptions.[70]

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[63] *Federal Accord Act* at subsection 61(1); *Provincial Accord Act* at subsection 64(1).
[64] See *Federal Accord Act* at section 64 and *Provincial Accord Act* at section 67.
[65] *Federal Accord Act* at subsection 61(5); *Provincial Accord Act* at subsection 64(5).
[66] *Federal Accord Act* at subsection 63(1); *Provincial Accord Act* at subsection 66(1).
[67] *Federal Accord Act* at section 68; *Provincial Accord Act* at section 71.
[68] *Provincial Accord Act* at subsection 71(2).
[69] See section 140 of the *Federal Accord Act* and section 134 of the *Provincial Accord Act*, which impose a general prohibition against the carrying out of works or activities related to the exploration for or exploitation of petroleum in the offshore area without the necessary operating licence and authorization issued by the CNSOPB.
[70] *Federal Accord Act* at subsection 72(2); *Provincial Accord Act* at subsection 75(2).

3.1.4 *Declarations of Significant Discovery and Significant Discovery Licences*

The *Accord Acts* envision that exploration activities conducted under ELs may—but will not necessarily—lead to applications for Declarations of Significant Discovery. Much will depend on whether or not significant petroleum resources are actually discovered within a parcel that is being explored.

When a proponent conducting exploration activities under an EL discovers petroleum resources that are deemed to be significant, the CNSOPB may make a Declaration of Significant Discovery. This declaration then paves the way for the proponent (and potentially other interested parties) to apply for a Significant Discovery Licence ("SDL").

Under the *Accord Acts*, an SDL confers the following rights in the licence area: the right to explore for petroleum; exclusive rights to drill and test for petroleum; an exclusive right to develop the licence area to produce petroleum (still in line with the parameters of exploratory production, not commercial production); and, the exclusive right to obtain a Production Licence, conditional upon compliance with other provisions of the Acts.[71]

The *Accord Acts* contemplate that SDL areas will often overlap with EL areas but may also go beyond them when significant discoveries are found to extend beyond the boundaries of a parcel to which an EL applies. The Acts establish specific processes that the CNSOPB will administer to issue Calls for Bids pertaining to un-licenced significant discovery areas in such circumstances.[72]

When an SDL is issued for an area to which an EL applies, the SDL supplants the EL, and the EL ceases to have effect in relation to the significant discovery area.[73]

The issuance of an SDL in an area to which an EL applies is not a "fundamental decision" that can be set aside by the Federal Minister and Provincial Minister. However, when a significant discovery area is found to extend into an area in which no ELs or other private interests apply, a CNSOPB decision to issue a Call for Bids in respect of the un-licenced area is a "fundamental decision" that the Ministers can set aside.[74]

3.1.5 *Declarations of Commercial Discovery and Production Licences*

Just as the *Accord Acts* envision that exploration activities conducted under ELs may—but will not necessarily—lead to applications for Declarations of Significant Discovery, so too do the Acts envision that Declarations of Commercial Discovery could follow exploration activities.

[71] *Federal Accord Act* at section 75; *Provincial Accord Act* at section 78.
[72] See *Federal Accord Act* at sections 76 and *Provincial Accord Act* at 79.
[73] *Federal Accord Act* at subsection 78(1); *Provincial Accord Act* at 81(1).
[74] *Federal Accord Act* at subsection 76(3); *Provincial Accord Act* at subsection 79(4).

Under the *Accord Acts*, when a proponent discovers petroleum resources that meet the "commercial discovery" threshold,[75] the CNSOPB may make a Declaration of Commercial Discovery. This declaration then enables proponents to apply for Production Licences ("PLs").

A PL issued under the *Accord Acts* confers the following rights in the licence area: the right to explore for petroleum; exclusive rights to drill and test for petroleum; an exclusive right to develop the licenced portions of the offshore area to produce petroleum; an exclusive right to produce petroleum; and, title to the petroleum produced.[76] A PL is the only licence issued under the *Accord Acts* that confers title to the petroleum produced, which makes it a prerequisite for commercial production activities.

Under the *Accord Acts*, when a proponent holds an EL or SDL in an area that has been declared to be a commercial discovery area, the CNSOPB *must* issue a PL to that proponent if the proponent applies for it, subject to a limited exception that requires PLs (and all shares in PLs) to be held by corporations incorporated in Canada.[77]

As with significant discoveries, the *Accord Acts* envision that commercial discoveries may be made in areas that extend beyond the boundaries of parcels to which ELs or SDLs apply. There are therefore provisions establishing the requirements for Calls for Bids that the CNSOPB may make when commercial discoveries are made in un-licenced areas.[78] A CNSOPB decision to make a Call for Bids for a PL in an area where no ELs or SDLs or other private interests apply is another "fundamental decision" that the Ministers can set aside.[79]

3.2 Assessment Processes that Intersect with Licensing by the CNSOPB

As noted above, the CNSOPB administers SEA and EA processes at different stages of the offshore petroleum bidding, licencing, and authorization regime. Some of the activities that the CNSOPB is empowered to authorize may also trigger IAs under the federal *IAA* (as it currently stands).

3.2.1 *Strategic Environmental Assessments by the CNSOPB*

The most recent SEA conducted by the CNSOPB was carried out on the Board's behalf by the consulting company Wood Environment & Infrastructure Solutions.[80] The resulting SEA report ("Wood SEA Report" or the "Report") is a good source of insight into the Board's SEA practice. More extensive evaluation of the SEAs conducted by the CNSOPB over the past several years would be a valuable subject for further study if deeper insights into the Board's SEA practice is desired.

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[75] Under the *Accord Acts*, a "commercial discovery" is "a discovery of petroleum that has been demonstrated to contain petroleum reserves that justify the investment of capital and effort to bring the discovery to production": see *Federal Accord Act* at section 49 and *Provincial Accord Act* at section 54.
[76] *Federal Accord Act* at section 83; *Provincial Accord Act* at section 86.
[77] *Federal Accord Act* at clause 84(1)(a) and section 90; *Provincial Accord Act* at clause 87(1)(a) and section 93.
[78] See *Federal Accord Act* at subsections 84(2)-(4) and *Provincial Accord Act* at subsections 87(2)-(4).
[79] *Ibid*.
[80] Wood Environment & Infrastructure Solutions, "Strategic Environmental Assessment – Middle and Eastern Scotian Slope and Sable Island Bank Areas: Final Report" (18 May 2022) ["Wood SEA Report"].

The Wood SEA Report states that the CNSOPB has been conducting SEAs since 2003.[81] SEAs are typically initiated prior to decisions to make Calls for Bids that could lead to the issuance of ELs, if the areas in question have not previously been evaluated through an SEA (or an up-to-date SEA).[82]

As noted above, the *Accord Acts* do not explicitly empower or require the CNSOPB to conduct SEAs before issuing Calls for Bids for ELs or other licences. However, legal scholarship states that in 2005, the Board received direction from the Government of Canada and Government of Nova Scotia to conduct SEAs of prospective licence areas where comprehensive reviews had not been conducted previously.[83] These directions are said to be based on a determination that a federal Cabinet Directive on SEAs applies to CNSOPB decisions to open marine areas to petroleum exploration activities.[84]

On the one hand, this arrangement may be taken as a positive indication that the Government of Canada, Government of Nova Scotia, and CNSOPB take a serious view of the CNSOPB's role as a governmental authority that makes impactful decisions in the Offshore Area. However, the absence of explicitly legislated authority and responsibility raises concerns that future governments could alter course and remove the relatively informal requirement under which the CNSOPB is currently operating. Not least for these reasons, it would be preferable for the *Accord Acts* themselves to impose SEA requirements for specified Board activities.

SEAs conducted by the CNSOPB inform project-specific EAs that the Board requires as part of its activity authorization process.[85] Tiering SEAs and EAs is valuable from an environmental protection perspective. Tiering can also be beneficial to proponents, because it can enable consideration of "high-level", "big-picture" issues before project-specific EAs are conducted, which reduces the burden on proponents to amass "big-picture" information and allows them to focus on providing the finer-grained details that pertain to the specific activities they wish to conduct. It is beyond the scope of this report to evaluate how effectively SEA and EA practices are being tiered by the CNSOPB; however, some noteworthy language contained within the Wood SEA Report indicates that the Board is aware of best-practice expectations for efficient and effective tiering. The Report notes:

> A SEA is not intended to be a replacement for a project-specific EA review process or to exempt project-specific EAs. The objective of SEA is to provide the type and level of information necessary to inform decision-making before project-specific activities are defined and proposed. Future offshore oil and gas activities within the Study Area, and the Canada-Nova Scotia offshore area in general will require review and approval under, and/or compliance with, a range of applicable legislation and regulations. However, the

[81] Wood SEA Report at page 1.
[82] See CNSOPB, "Calls for Bids" (undated). See also CNSOPB, "Public Registry: SEAs" (undated). See also "Using Strategic Assessments to Guide Oil and Gas Exploration Decisions" at page 110. The Wood SEA Report states at page 231 that the "strategic" CNSOPB decision that the Board's SEAs are intended to inform is "whether future exploration rights should be issued in whole, in part, or at all" in the area under study.
[83] "Using Strategic Assessments to Guide Oil and Gas Exploration Decisions" at page 110.
[84] *Ibid*.
[85] CNSOPB, "Environmental Assessments" (undated).

SEA will provide relevant information for consideration in the early planning phases of individual projects.[86]

Notably, the Wood SEA Report includes several specific recommendations concerning issues that will require further study in project-specific EAs, which is suggestive of an expectation that potential use interactions and environmental effects identified at a high level in the SEA will be assessed in more detail in project-specific EAs.[87]

One limitation of the Wood SEA Report is its approach to cumulative effects assessment. The Report indicates that although cumulative effects assessment was carried out to some extent, its scope was fairly limited. The sections of the Report that deal primarily with cumulative effects identify several significant changes to the marine environment under study that could be caused by the cumulative effects of activities conducted within the area. However, the Report goes on to state in respect of some of those concerns that because no offshore oil and gas activities are currently happening within the study area, there is low potential for interactions between those activities and other components of the environment.[88] In other words, the Report fails to take a prospective approach that considers how many exploration or production activities might be conceivable within the study area and what the cumulative effects of those activities could be.

More extensive review of other SEAs conducted by the CNSOPB would be required to determine if this limitation is unique to the Wood SEA Report or if it is reflective of a larger pattern of weak cumulative effects assessments being conducted in CNSOPB SEAs.

3.2.2 *Environmental Assessments by the CNSOPB and Federal Impact Assessments*

Currently, the *Accord Acts* do not explicitly require the CNSOPB to conduct EAs for proposed activities that do not trigger the federal IA process. However, the CNSOPB's website states that the Board will require EAs for the following activities that do not trigger the federal process:

- "geophysical and geotechnical programs, including seismic surveying";
- "exploration drilling programs that take place subsequent to the first drilling program within an exploration licence"; and
- "some decommissioning programs".[89]

The CNSOPB states that when Canada's *IAA* requires an IA for an activity that would otherwise require an EA under the *Accord Acts* regime, the Board "typically accepts the IA as fulfilling its *Accord Acts* authorization requirement for EA".[90]

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[86] Wood SEA Report at page 3.
[87] See for example *ibid* at page 105.
[88] *Ibid* at page 294.
[89] CNSOPB, "Environment" (undated).
[90] *Ibid*.

Given the absence within the *Accord Acts* of explicit EA requirements for activities that do not require IAs, the source of the Board's perspective on its EA responsibilities is unclear. It is possible that a directive issued by the Government of Canada and/or the Government of Nova Scotia assigned EA responsibilities that are specific to the *Accord Acts* regime;[91] however, my research has not yet discovered any such directive by the government(s), and a direct inquiry to the CNSOPB has not yet been answered.

3.3 Directives, Guidelines, Statements of Practice, and Memoranda of Understanding

In addition to the legislated requirements that shape the CNSOPB's regulation of offshore oil and gas activities, the *Accord Acts* regime also envisions and is implemented in part through various regulations, directives, guidelines, statements of practice, and memoranda of understanding. It is beyond the scope of this report to review and describe these additional instruments. For the purposes of this study, their existence is noted simply to highlight the fact that regulations and directives established by the Government of Canada and Government of Nova Scotia shape the Board's responsibilities and activities, and it is likely that such instruments will be used to elaborate the re-mandated CNSOER's responsibilities in respect of offshore renewable energy projects.

[91] There is a suggestion to this effect on page 110 of "Using Strategic Assessments to Guide Oil and Gas Exploration Decisions"; however, the source cited by the authors of that paper did not provide further illumination on this point.

4.0 Submerged Land Licensing for Offshore Wind Developments under Proposed *Accord Acts* Amendments

4.1 Submerged Land Licensing as Proposed in Bill C-49

As noted above, in May 2023, Canada's Minister of Energy and Natural Resources introduced Bill C-49 in the House of Commons. As concerns the evolving legal regimes for wind energy development in marine areas within and around Nova Scotia, the Bill is significant because it proposes legislative amendments that will be necessary to facilitate joint federal-provincial regulation in the offshore area that is governed under the CAN-NS Accord. Included among the proposed amendments are changes that will rename the CNSOPB as the CNSOER and give the Regulator an expanded mandate to regulate offshore renewable energy projects of various kinds.

Bill C-49 proposes to amend the title of the *Federal Accord Act* to the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation and Offshore Renewable Energy Management Act*.[92] This proposed amendment demonstrates that the Act will remain the "implementation Act" for the CAN-NS Accord and that the joint-management regime for offshore renewable energy projects will be *in addition to*, not part of, the CAN-NS Accord implementation regime.[93]

Bill C-49 defines "offshore renewable energy project" as meaning any of the following works or activities:

> (a) any research or assessment conducted in relation to the exploitation or potential exploitation of a renewable resource to produce an energy product, unless it is conducted by or on behalf of a government or educational institution,
>
> (b) any exploitation of a renewable resource to produce an energy product,
>
> (c) any storage of an energy product produced from a renewable resource, and
>
> (d) any transmission of an energy product produced from a renewable resource.[94]

Another important definition introduced by the Bill is the definition of the phrase "offshore renewable energy recommendation", which is defined as meaning: "a recommendation made by the Regulator respecting the exercise of a power or the performance of a duty under a provision of this Act that expressly provides for the exercise of the power or the performance of the duty subject to sections 38.1 to 38.3".[95] In a reversal of the process under the *Accord Acts* petroleum resources regime, the proposed offshore renewable energy regime envisions that instead of the CNSOER making "fundamental decisions" that can be set aside by the Ministers, the CNSOER will only make "recommendations" concerning key steps of the offshore renewable energy

[92] Bill C-49 at clause 108.
[93] This is also made clear by section 112 of the Bill, which proposes to add the following statement to the amended statute: "For greater certainty, the Accord does not apply to offshore renewable energy resources".
[94] Bill C-49 at clause 109(3).
[95] *Ibid* at clause 109(3).

projects licencing process, and the Ministers will hold the ultimate authority to decide what steps will be taken. Notably, the decisions to make Calls for Bids and issue submerged land licences for offshore renewable energy projects are decisions about which the CNSOER may only make "recommendations"; ultimately, the Ministers will decide if and when those steps will be taken.[96]

Bill C-49 indicates that the amended *Accord Acts* will provide the primary regime under which offshore renewable energy projects, including offshore wind developments, will be governed within the defined Offshore Area. The Bill states explicitly that Part 5 of the *Canadian Energy Regulator Act* will not apply within the Offshore Area.[97]

To establish the necessary components of the offshore renewable energy regime, the Bill proposes a suite of provisions that will give new powers and responsibilities to the re-mandated CNSOER, as well as to the Ministers themselves. These proposed amendments envision that the CNSOER will be obliged to notify the Ministers in writing of any offshore renewable energy recommendation that the Regulator decides to make.[98] The Ministers must then notify the Regulator in writing as to whether they approve the Regulator's recommendation (with or without variations) or reject it.[99] This notification must be provided within sixty days after the Ministers receive a recommendation from the Regulator;[100] however, the Bill proposes to give the Ministers discretion to extend that timeline under two circumstances:

- either Minister can extend the timeline for an additional thirty-day period by notifying the Regulator and the other Minister in writing (this is analogous to the current timelines for a decision to set aside a "fundamental decision" of the CNSOPB under the existing petroleum regime); and,

- in respect of an offshore renewable energy recommendation that recommends the making of a Call for Bids, the Ministers have unlimited discretion to extend the timeline.[101]

Under the amendments proposed in Bill C-49, the Ministers have the power to issue a joint direction to the Regulator prohibiting the issuance of submerged land licences in any portion(s) of the Offshore Area, "for any purposes and under any conditions set out in the order", subject to a limited exception related to the Federal Minister's powers to facilitate the resolution of disagreements with foreign governments concerning international boundaries.[102] Additionally, the federal Governor in Council (effectively, the federal Cabinet) will be empowered to make regulations that prohibit the commencement or continuation of an offshore renewable energy project in any portion of the Offshore Area that is or may be identified under federal or provincial legislation as "an area for environmental or wildlife conservation or protection".[103] Associated negotiation powers and responsibilities are set out to allow the Ministers to address compensation requirements that may be necessary in such circumstances.

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[96] *Ibid* at clause 147.
[97] *Ibid* at clause 112.
[98] *Ibid* at clause 125.
[99] *Ibid.*
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid* at clause 135(1).
[103] *Ibid* at clause 137.

To summarize, what Bill C-49 envisions in respect of the submerged land licencing process for offshore renewable energy projects is as follows. The CNSOER will form an opinion concerning whether a Call for Bids for submerged land licences should be issued for one or more portions of the Offshore Area. If the Regulator forms the opinion that a Call for Bids should be issued, it will make a recommendation to the Ministers concerning that Call for Bids, including what details the Call for Bids should include. The Ministers, acting jointly, will decide if the Call for Bids should be issued, including what details it should include. If the Ministers decide that the Call for Bids should be issued, the Regulator will issue it and administer the bidding process. At the conclusion of the process, the Regulator will recommend one or more successful bidders to the Ministers, and the Ministers will decide to approve or reject the Regulator's recommendation to issue one or more submerged land licences.

As envisioned by Bill C-49, a submerged land licence will confer, "with respect to the portions of the offshore area to which it applies and subject to the terms and conditions it specifies, the right to carry on an offshore renewable energy project".[104] Although further authorizations from the CNSOER (and potentially from the IAAC) will be necessary, the licencing process for offshore renewable energy projects is not staged like the consecutive licencing process for offshore petroleum activities. One licence is all that will be needed to confer the rights that are necessary to construct and operate a renewable energy project in the licence area.

As proposed by Bill C-49, submerged land licences will be required for all but a limited number of offshore renewable energy activities conducted in the Offshore Area. The exceptions are research and assessment activities that relate to the exploitation or potential exploitation of renewable energy resources to produce energy products, if those activities do not require attaching a facility or structure to the seabed.[105]

4.2 Comparison to Petroleum Activities Licensing under the Current *Accord Acts* Regime

The most significant difference between the licencing process that the *Accord Acts* establish for petroleum activities and the licencing process that Bill C-49 proposes to establish for offshore renewable energy projects is the reversal of authority between the CNSOER and the Ministers. As discussed above, whereas the *Accord Acts* empower the CNSOPB to make "fundamental decisions" that are subject to being set aside by the Ministers, the CNSOER will not have the authority to make key decisions unilaterally under the proposed offshore renewable energy regime. Instead, it will need to make "offshore renewable energy recommendations" to the Ministers, and the Ministers will hold the ultimate authority to decide what key steps will be taken, and where, and when. In this regard, Bill C-49 proposes to reserve primary strategic planning powers and responsibilities for the Ministers instead of assigning those responsibilities to the CNSOER.

Bill C-49 also proposes to amend Part III of the *Accord Acts*, which is the part that deals primarily with operating licences and activity authorizations issued by the CNSOPB. The proposed amendments introduce another general prohibition, which would make it unlawful for

[104] *Ibid* at clause 147.
[105] *Ibid*.

any person to carry out work or activities related to offshore renewable energy projects in the Offshore Area without first obtaining an authorization issued by the CNSOER.[106] The authorizations envisioned by this amendment will likely be analogous to the activity authorizations that the CNSOPB currently administers for petroleum activities, though presumably the Regulator will develop distinct authorizations and application processes for offshore renewable energy projects.

Notably, the CNSOER's authority to issue authorizations of this kind under Part III of the amended *Accord Acts* will not be subject to the "recommendation" requirement that Bill C-49 imposes for Calls for Bids and the issuance of submerged land licences. Here, the Regulator will be empowered to act more independently, in a manner that is more in line with the authority it exercises over petroleum resource activities.

Canada's *IAA* will set the primary restrictions on the CNSOER's power to issue authorizations for offshore renewable energy projects under Part III of the *Accord Acts.* As proposed by Bill C-49, the Regulator will not be able to issue an authorization for an offshore renewable energy project if the proposed activity has triggered the federal IA process and an approval under that process has not yet been issued.[107]

Interestingly, Bill C-49 proposes to give the Regulator explicit powers (but not obligations) to conduct RAs and "strategic assessments" ("SAs") to inform its processes.[108] Although the structure and language of Bill C-49 do not make it absolutely clear that the RAs and SAs envisioned by the Bill would be conducted outside of the federal *IAA* regime, East Coast Environmental Law interprets the proposed powers as being separate and distinct from the RA and SA powers set out in the *IAA*. In our view, the proposed amendments would give the Regulator independent power to conduct RAs and SAs in its own discretion.

That being said, exactly what is meant by "SAs" in Bill C-49 is unclear. It may be that the Government of Canada and Government of Nova Scotia envision SAs under the amended *Accord Acts* as being the same as SEAs. However, it is worth noting that the SA powers that currently exist under the *IAA* are confined to the assessment of policies, plans, and programs that are relevant to conducting IAs under that Act,[109] so there is a precedent for the Government of Canada using the term "SA" to mean something different from, and narrower than, "SEA". Obtaining clarity on the meaning of "SA" as that term is used in Bill C-49 would be valuable as the House of Commons and Senate consider the Bill and give thought to any changes that may be required.

4.3 Anticipated Intersections with the Regional Assessment of Offshore Wind Development in Nova Scotia

The study area for the NS Offshore Wind RA corresponds with the Offshore Area that is governed under the CAN-NS Accord and its *Accord Acts*. Since it began its work, the NS

[106] *Ibid* at clause 166.
[107] *Ibid* at clause 170.
[108] *Ibid.*
[109] *Impact Assessment Act*, SC 2019, c 28, s 1 at subsection 95(1).

Offshore Wind RA Committee has been gathering information and working with marine spatial planning and constraints analysis tools to identify areas within the Offshore Area where offshore wind energy development may be most suitable.

The Government of Nova Scotia has indicated that it is working with the Government of Canada to identify "Wind Energy Areas" within the Offshore Area, drawing on information from "developers, Mi'kmaq and Indigenous peoples from other communities, other interested parties, and the independent regional assessment committee recommendations".[110] It has also indicated that one of these Wind Energy Areas will be the location of the first Call for Bids issued under the amended *Accord Acts* regime.[111] The NS Offshore Wind RA can therefore be expected to intersect with the amended *Accord Acts* regime by informing the strategic consideration and decision-making by the CNSOER and Ministers as to which offshore areas should be opened to developers through the issuance of one or more Calls for Bids that could lead to the issuance of submerged land licences for offshore renewable energy projects.

4.4 Opportunities for Improvement

The *Accord Acts* amendments proposed by Bill C-49 will lay the foundation for marine wind energy regulation in the jointly-managed waters of offshore Nova Scotia. As regards licencing and authorization administered by the CNSOER, there are several interesting and potentially promising aspects of the Bill, but there are also opportunities for improvement. This report highlights four, suggesting that the amendments proposed in Bill C-49 could be revised to: expand the purpose section of Part III of the *Accord Acts* to contextualize the new mandate of the CNSOER; clarify the intention of the RA and SA provisions of the Bill; require the CNSOER to conduct RAs, SEAs, and EAs in specified circumstances and impose associated requirements and guidelines for meaningful cumulative effects assessment; and, impose requirements for public participation opportunities and associated participant funding programs.

4.4.1 *Expand the Purpose Section of Part III of the Accord Acts to Contextualize the New Mandate of the CNSOER*

Bill C-49 proposes to amend the purpose section of Part III of the *Federal Accord Act* by including a reference to offshore renewable energy projects, but this reference, as proposed, is limited to the "safety" mandate set out in this part of the Act. The proposed amendment is as follows:

> **138.1** The purpose of this Part is to promote
>
> > **(a)** safety, particularly by encouraging persons exploring for and exploiting petroleum or carrying on an offshore renewable energy project to maintain a prudent regime for achieving safety;
> >
> > **(b)** the protection of the environment;

[110] *Offshore Wind Roadmap*: draft Module 1 at page 12.
[111] *Ibid*.

> **(b.1)** accountability in accordance with the "polluter pays" principle; and
>
> **(c)** in respect of the exploration for and exploitation of petroleum, the conservation of petroleum resources and joint production arrangements.[112]
>
> [underlining in the original]

As was discussed above, the purpose provisions that currently appear in Part III of the *Accord Acts* are the Acts' sole purpose provisions. They therefore play a significant, if limited, role in contextualizing the current mandate of the CNSOPB, and they will continue to do so in respect of the re-mandated CNSOER.

The environmental protection mandate imposed by the current wording of this purpose section can be expected to apply broadly to the CNSOER's regulation of offshore renewable energy projects in the same way that it has applied to the CNSOPB's regulation of offshore petroleum activities, and it can therefore be expected to support the CNSOER's SEA and EA practices. However, it would be valuable to use the current *Accord Acts* amendments process as an opportunity to further contextualize the Regulator's mandate in respect of offshore renewable energy development.

At the very least, it would be valuable for the purpose section to draw on the "conservation" language that applies to petroleum resource activities so as to enhance the existing theme of "wise use" of available resources. This is also an opportunity to introduce more explicit recognition of the climate emergency that is driving the renewable energy transition and motivating the proposed amendments to the *Accord Acts* regime. The language of Goal 7 of the global Sustainable Development Goals, which envisions "access to affordable, reliable, sustainable, and modern energy for all",[113] could be another valuable inspiration. These themes could be expressed through an addition that states:

> "The purpose of this part is to promote … the wise use of offshore renewable energy resources, having regard to the need to mitigate climate change and the global goal of ensuring access to affordable, reliable, sustainable, and modern energy for all".

Bill C-49 indicates that the Regulator will play a comparatively limited role in setting the strategic direction of renewable energy development in the Offshore Area (a role that the Government of Canada and Government of Nova Scotia are proposing to reserve for themselves by retaining ultimate decision-making authority on key steps of the licencing process). Nevertheless, despite that limitation, the CNSOER will continue to play a significant role in steering resource development in offshore Nova Scotia. As Canada and Nova Scotia continue to invest in the renewable energy transition, it will be increasingly useful and necessary to explain how the CNSOER will be expected to balance its petroleum resource and renewable resource activities, including how it will be expected to prioritize competing uses of the Offshore Area if conflicts between petroleum and renewable energy activities arise.

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[112] Bill C-49 at clause 163.
[113] United Nations, Department of Economic and Social Affairs, "Sustainable Development: The 17 Goals" (undated).

4.4.2 *Clarify the Intention of the Regional Assessment and Strategic Assessment Provisions of Bill C-49*

As noted above, the language and structure of Bill C-49 suggest that the CNSOER will be empowered to conduct RAs and SAs independently of the federal *IAA* regime. However, the legislative intention in this regard is not entirely clear, and there is a possibility that the provisions in question are in fact intended to refer to the conduct of RAs and SAs under the *IAA*. Greater clarity would be beneficial. Ideally, clarification would make it explicit that the CNSOER will have independent powers to conduct RAs and SAs and that those powers are not confined to acting under the *IAA* regime.

Additionally, greater clarity is needed concerning the meaning of the phrase "SA". It is not clear if the Government of Canada and Government of Nova Scotia intend for "SA" to mean the same thing as "SEA". As a result, it is not clear if the governments are attempting to codify the CNSOPB's existing SEA practice by giving the CNSOER explicit powers to conduct SEAs to support its environmental protection mandate.

4.4.3 *Require the CNSOER to Conduct Regional Assessments, Strategic Environmental Assessments, and Environmental Assessments in Specified Circumstances, and Impose Associated Requirements and Guidelines for Meaningful Cumulative Effects Assessment*

As discussed above, the *Accord Acts* do not currently empower or require the CNSOPB to conduct RAs, SEAs, or EAs outside the federal IA regime; however, SEAs and EAs have been incorporated into the Board's established practice for some time.

The proposed amendment that will empower the CNSOER to conduct RAs and SAs is positive, but it would be better for the *Accord Acts* to give the CNSOER an explicit responsibility to conduct RAs, SEAs, and EAs in specified circumstances. This responsibility could be a codification and extension of the CNSOPB's current SEA and EA practices, requiring RAs or SEAs for areas where the potential impacts of offshore renewable energy projects have not yet been studied or where previous RAs or SEAs have identified information gaps that need to be filled. EAs could continue to be used at the project-specific assessment level to provide fine-grained detail and fill information gaps that are difficult to close with higher-level assessment processes.

Furthermore, review of the Wood SEA Report, discussed above, suggests that clear requirements and guidelines for meaningful cumulative effects assessment would be beneficial and would help to ensure that RAs, SEAs, and EAs serve the environmental protection purposes for which they are intended.

4.4. *Impose Requirements for Public Participation Opportunities and Associated Participant Funding Programs*

Finally, Bill C-49 proposes to empower the Regulator to "establish a participant funding program to facilitate the participation of the public and any Indigenous peoples in Canada in consultations

concerning any matter respecting the offshore area".[114] However, the Bill does not propose to require the Regulator to do this, nor are there any provisions explaining how such a participant funding program would be financed. There are also very few requirements creating public participation opportunities under the current *Accord Acts* and the amendments proposed in Bill C-49: mainly, the existing and proposed requirements make it necessary to provide public notice when various steps of licencing processes are taken.

The CNSOER should be required to include public participation opportunities in any RA, SEA, SA, or EA conducted under the *Accord Acts*, and the establishment of a participant funding program should be required as well instead of merely being an option.

Additionally, although it could be assumed that the finances for a participant funding program would come jointly from Canada and Nova Scotia under the general cost-sharing provisions of the *Accord Acts*, or that participant funding programs might perhaps be financed entirely by one government by agreement or under special circumstances, more clarity on this point would be valuable.

[114] Bill C-49 at clause 62.